Lord Hodson (after saying that their Lordships were of the opinion that the appellants had failed to show that there were any documents which could be said to show that there had been such a substantial miscarriage of justice that the concurrent findings of fact ought to be reversed, continued:) The second ground of appeal depending on the allegation that the respondent was in breach of a condition of his policy, is said to be established by his own evidence that he kept stock books, that the stock books relating to the goods destroyed by fire were left on the shelf in the shop which caught fire—that the books were burned and that usually they took their books to their homes at night and put them in the safe, but on this night they were left in the shop.

Their Lordships are of opinion that the appellants should not be allowed to take this point at this stage. In the first place, the point could have been met by evidence that if the claim had been made against the company under a subsisting policy the company would not rely on the breach of the condition or possibly by some other evidence. Their Lordships would not depart from their practice of refusing to allow a point not taken before to be argued unless satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea: *Connecticut Fire Insurance Co.* v. *Kavanagh*[1] and *Archambault* v. *Archambault*[2].

Even if the facts were beyond dispute and no further investigation of fact were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the court below. In this case the appellants have relied in support of their submission that there was a breach of condition on two South African cases, *Lewis Ltd.* v. *Norwich Union Fire Insurance Co. Ltd.*[3] and *Sacks* v. *Western Assurance Co.*,[4] which on similar facts support their submission, but their Lordships are not prepared to say that the point is too plain for argument to be required upon it. The arguments and judgments in these two cases indicate that at any rate in the United States of America there are conflicting decisions on this topic, and no direct authority in this country was available so far as the researches of the appellants were able to show. Accordingly, their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim is to be defeated by reason of his breach of a condition of his contract of insurance with the Jubilee Co., and they would follow the guidance given by Lord Birkenhead L.C. in *North Staffordshire Railway Co.* v. *Edge*,[5] when he said:

> "The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in his case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

The Lord Chancellor went on to say that there might be very exceptional cases where new matters might be considered, but their Lordships do not regard this case as requiring such exceptional treatment.

Accordingly, their Lordships will humbly advise Her Majesty that this appeal be dismissed, subject to a variation in the amount of damages which by an oversight have been wrongly assessed.

Appeal dismissed.

Solicitors:—*Goodman, Derrick & Co.; T. L. Wilson & Co.*

CHUA KIM LIANG & ANOR. v. TEO KIM NGO

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) April 18, 1963]

[Seremban — F.M. Civil Appeal No. 2 of 1963]

Damages—Personal injuries—Assessment of damages—Loss of sexual function—Test for intervention of appellate Court.

The fixation of general damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. A finding of the trial Judge will only be substituted on appeal if the appellate court is satisfied that the Judge has acted on a wrong principle of law, or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered.

Case referred to:—

Scott v. *Musial* [1959] 2 Q.B. 429 at p. 437.

COURT OF APPEAL.

V. C. George for the appellants.

M. Sankar for the respondent.

Thomson C.J. (delivering oral judgment): The plaintiff in this case suffered personal injury as a result of a road accident which was caused by the negligent driving of a motor-car by the second defendant in the employment of the first defendant. Liability was admitted at the trial which took place on 19th May, 1959, and to-day, 18th April 1963, that is a month short of four years later, the unfortunate man is finally going to learn what compensation he is going to obtain.

The only question we have to consider here is that of the quantum of damages. In that connection Mr. Justice Ismail Khan awarded

$2,321 for special damages and no one quarrels with that figure.

Then he awarded $25,000 for general damages, disability that the respondent is going to suffer and pain he is going to suffer and a certain amount of inconvenience including a certain amount of inconvenience in connection with his sexual functions.

It is against that award of $25,000 that the defendants have appealed and their main complaint is that it contains an element of compensation, the exact amount of which is impossible to determine, for the respondent's loss of sexual function.

I think on the evidence it is fair to say that it is not denied that the respondent has suffered some derangement of his sexual functions. He says he is unable to obtain an erection. A European-trained doctor who has examined him says that a broken thigh bone has united badly and when he attempts to perform the sexual act this causes him pain and produces psychological consequences.

If the matter were capable of precise financial assessment there might be something to be said for taking it further. It is not, however, capable of precise financial assessment. We have got to take the overall picture of this unfortunate man as he is now compared with what he was in the days of his youthful health and strength before he suffered from the negligent act of the second defendant and we have got to apply our minds at this stage not to the question of what is a suitable compensation but the question of whether the trial Judge's assessment of a suitable compensation is wholly erroneous.

For myself I am inclined to the view that had I myself been sitting at first instance I would have awarded a somewhat smaller sum by way of general damages. That, however, is not the point. The point is thus put by Morris L.J. in the case of *Scott* v. *Musial*:—[1]

"It is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three Judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial Judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the Judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered."

I am not prepared to say that the award by Mr. Justice Ismail Khan comes within any portion of the last sentence of that passage and I would accordingly dismiss the appeal with costs.

Hill and **Barakbah JJ.A.** concurred.

Appeal dismissed.

Solicitors:—*George & Khoo; Shearn Delamore & Co.*

MAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Suffian J.) April 21, 1963]

[Alor Star — Criminal Appeal No. 13 of 1963]

Criminal evidence—Burden of proof—Meaning of—Explanation by accused—When accused entitled to acquittal.

The appellant in this case was charged with theft and alternatively with dishonestly retaining stolen property. He gave evidence and called witnesses in his defence at the end of which he was convicted because "on the whole" the learned Magistrate was "unable to believe the defence."

Held: the learned Magistrate had seriously misdirected himself as to the meaning of the burden of proof by the accused in cases where it was necessary for him to rebut the prosecution case against him.

If the court accepts the explanation given by or on behalf of the accused, it must acquit. But this does not entitle the court to convict if it does not believe that explanation, for he is still entitled to an acquittal if the explanation raises a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

MAGISTRATE'S CRIMINAL APPEAL.

G. N. Christie for the appellant.

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian J.: This appeal is allowed only on one ground. The appellant charged with theft of two chickens and alternatively with dishonestly retaining stolen property namely one chicken gave evidence and called witnesses in his defence at the end of which he was convicted because in the words of the learned Magistrate "On the whole I am unable to believe the defence." I agree with Inche Christie, counsel for the appellant, that the learned Magistrate has seriously misdirected himself as to the meaning of the burden of proof by the accused in cases where it is necessary for him to rebut the prosecution case against him.

The correct law for Magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt,